IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MRS. JUSTICE K.HEMA

MONDAY, THE 18TH JUNE 2007 / 28TH JYAISHTA 1929

CRL.A.No. 194 of 2004()

SC.1/2000 of ADDITIONAL SESSIONS JUDGE (ADHOC) , FAST TRACK COURT NO.II, MANJERI
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APPELLANT: ACCUSED

SAKEER HUSSAIN S/O. ABDULLA,
ADAVANKARAN HOUSE, PAYYANAD AMSOM, CHENGANA
ERNAD TALUK, MANJERI, MALAPPURAM DISTRICT

BY ADV. SRI.K.M.SATHYANATHA MENON

RESPONDENTS:
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1. THE CIRCLE INSPECTOR OF POLICE,
MANJERI POLICE STATION, MANJERI, MALAPPURAM DIST.

2. THE STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH CLOURT OF KERALA,
ERNAKULAM, COCHIN-682031

BY PUBLIC PROSECUTOR SRI.K.C.SANTHOSH KUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 18/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

Crl.Appeal No.194 of 2004.

Appellant is the accused in a Sessions Case before the Addl. Sessions Court. He was charge-sheeted for offences under section 302, 392 and 201 of Indian Penal Code ('IPC' for short. He was convicted and sentenced under section 302 of IPC to undergo rigorous imprisonment for life and to pay a fine of Rs.10,000/-. He was also sentenced to undergo rigorous imprisonment for 10 years under section 392 IPC and rigorous imprisonment for 7 years under section 201 of IPC. The said conviction and sentences are challenged in this appeal.

According to prosecution, the accused was in dire need of money. His autorickshaw was under threat of seizure by financier. He owed money to the financier since he defaulted payment of instalments. Therefore, he was motivated to commit murder. He, therefore, prepared for commission of crime and approached PW7 and obtained MO10 and MO11 knives which he was using for butchering. He then waited for deceased Mohammed when he was going back to his house from his jewellery shop. He offered a lift and the deceased got into the autorickshaw and he took him to an

isolated place, took out the weapons MOs 11 and 12 which were hidden in the backside of the autorickshaw. He stabbed on the chest of deceased Mohammed with MO11. When the knife fell down he used MO10 and gave a cut on the neck. The deceased died due to the injury sustained. The dead body was deposited in a water channel which is situated by the side of the road. Thereafter, he took out the flask which was in the possession of deceased Mohammed and drove the vehicle away. He washed the autorickshaw and verified the contents of the flask and finding that the flask did not contain gold ornaments, returned to the spot again and removed the watch from the hands of deceased Mohammed. He also took the bag from his possession. Thereafter, he returned MO10 and MO11 in the house of PW7. He has hidden the watch at the back side of his house. He also burnt off the dresses worn by the deceased and the ashes were hidden in a pit. The flask was also hidden in a field belonging to his father. The accused thereby allegedly committed murder, robbery and also caused the evidence to disappear for freeing himself as the offender.

To prove the prosecution case, prosecution examined PWs 1 to 25. Exhibits P1 to P31 and MO1 to MO15 were also marked. The court below found that several circumstances are proved against him. They are as follows:

(i) The accused had taken a loan for his auto- rickshaw from a financier as arranged by PW5;

(ii) There were threat of the vehicle being taken by financier and he had to hand over the same to PW5;

(iii) PW2 saw the deceased boarding an autorickshaw at 8.10 p.m. on the fateful night and on that day night the deceased was killed;

(iv) The crime occurred on the road in the auto- rickshaw and the body was taken to a channel in the nearby plantain garden;

(v) The accused took MOs 10 and 11 knives from PW7 on the date of occurrence and returned the same on the next day;

(vi) He instructed PW7 not to tell anybody that he had borrowed the knives;

(vii) Human blood was seen on the knives when subjected to chemical examination;

(viii) MO12 series shoes worn by the accused when he was arrested contained blood;

(ix) the accused was having a healing incised wound on the lateral part of the right middle finger;

(x) the auto rickshaw had a tear on the inner side portion of the passenger cabin;

(xi) The wound and tear could be caused by contacting MO10 or MO11 knives;

(xii) the injury found on the neck and chest of the deceased could be caused using weapons like MO10 and MO11.

(xiii) PW3, Scientific Asst. detected small traces of washed stain of blood from the lower side of the back seat of autorickshaw MO9;

(xiv) The flask and Rado watch were recovered as per the confession statement of the accused; and

(xv) the burnt remnants were recovered as per the confession statement of the accused.

The lower court found that the evidence adduced by the prosecution would indicate that the deceased had boarded the autorickshaw of the accused and he was done away with by cutting MO10 and MO11. Thereafter the body was taken to the nearby channel and the accused robbed the flask and the Rado watch. The lower court also found that there is only blanket denial and no explanation from the side of the accused about the recovery of watch, flask and the burnt remnants. The court found that the only hypothesis that is deductible from the facts placed before court is that the accused, in order to commit robbery, intentionally caused the death of Mohammed, robbed his Rado watch, flask and currency notes and

thereafter burnt the clothes, bag etc. in order to cause disappearance of evidence of commission of crime.

The accused put forward a case of blanket denial. According to him, he is totally innocent of the allegations made. His case is that he has not made any statement to the police officer which has led to the recovery of the alleged articles at his instance. There is no direct evidence in this case. Nobody has witnessed the incident. The prosecution has therefore attempted to establish the evidence by placing circumstantial evidence. The following circumstantial evidence are relied upon by the prosecution to bring home the guilty of the accused:

(a) The accused was in dire need of money.

(b) Deceased Mohammed was seen boarding an autorickshaw on 30.8.1999 at about 8.10 p.m. by PW2.

© MO9 autorickshaw was seized from the accused and blood stain was detected on the back seat of the autorickshaw.

(d)The flask and the watch which were in possession of deceased Mohammed immediately before death were recovered pursuant to alleged confession made by the accused.

(e) Ashes of burnt dresses worn by him at the time of occurrence,

the identity card of deceased Mohammed and the bag was recovered at the instance of the accused pursuant to a confession statement as pointed out by him. The shoes worn by the accused contained blood.

(f) The accused had a healing wound on his finger when he was arrested on 7.9.99.

It is well-settled that when a case rests on circumstantial evidence such circumstances have to be proved by the prosecution. The Supreme Court in **Chandmal and another** v. **State of Rajasthan** (AIR 1976 SC 917) held as follows:

" It is well settled that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests. Firstly, the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established. Secondly, those circumstances, should be of a definite tendency unerringly pointing towards the guilt of the accused. Thirdly, circumstances taken cumulatively, should from a chain so complete that there is no escape from the conclusion that within all human probability that crime was committed by the accused and none else. That is to say the circumstances should be incapable of explanation or any

reasonable hypothesis except that of the accused's guilt".

It is clear from a reading of the said decision that each of the circumstance which is relied upon by the prosecution has to be independently proved. The proved circumstances must be examined by the court and such circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused. Such circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that in all human probability a crime was committed by the accused and the accused alone. The circumstances established should be incapable of any explanation or any reasonable hypothesis except that of the guilt of the accused. With these principles in mind, we shall examine the circumstantial evidence which are relied upon by the prosecution.

FINANCIAL STRINGENCY:

According to prosecution, accused was in need of money, since his autorickshaw was under threat of seizure by the financier. To prove the said case, PWs 5 and 6 were examined by the prosecution. But the lower court has relied upon only the evidence of PW5 as a proved circumstance as per paragraph 26 of the judgment. The evidence of PW5 would reveal that PW5 has deposed that accused had an autorickshaw bearing number

KL.10.D.7664 and it was purchased by him on loan. He had to pay an amount of Rs.60,000/- in 30 instalments. He had paid only 25 instalments. Though several times demands were made to pay the amount, he could not pay the same. Therefore, on 4.9.1999, he sent PW6 to the house of the accused. The accused brought the vehicle to him and surrendered the same to PW5 and, on enquiry by the police, on 7.9.1999, he produced the same before the police. PW5 was cross-examined and it has brought out from his evidence that there are records to prove that the accused was financed to purchase the autorickshaw. It is also stated by him that he had shown the document to the police and that there was documents, details of the financier and the amount of loan due etc. The documents which reveal the dues are also shown to the police. It is also brought out from his evidence that there was an agreement on a stamp paper. It is also stated by PW5 that had promised to produce the documents when he is directed to produce the same that those documents were released to him on a kaychit. But those documents were not produced before court. It is needless to say that the best evidence to prove that the autorickshaw allegedly involved in the incident belonged to the accused and that there was a loan and some amount was due etc. could be proved by documentary evidence. When best evidence is available, the prosecution is bound to produce the best

evidence. In the absence of production of the best evidence and the non-production of the same inspite of the availability of such documents would lead to adverse inference as per law. In the absence of production such document it is not proper to place reliance on the oral evidence of PW5 alone to call that accused was in financial stringency and that he was the owner of the autorickshaw. The registration certificate is also not produced in this case. It is also to be noted that even going by the evidence of PW5, there is only an amount of Rs.10,000/- which is due from the accused to the financier. In this context, it is to be borne in mind that incriminating evidence relating to MO9, which is an autorickhsaw, which allegedly belonged to the accused for which no documentary evidence is produced as given from the custody of PW5. He has produced the autorickshaw from the custody of PW5. This is also an added factor which persuades the court to insist upon documentary evidence before placing explicit reliance upon the evidence of PW5 to prove that the accused was in possession of the autorickshaw involved in the the occurrence and that he was in need of money. In the above circumstances, we hold that the fact that the accused was in financial stringency and that he was in possession of the autorickshaw MO9 is not proved conclusively by the prosecution.

<u>BOARING AUTORICKSHAW.</u>

The next circumstance relied upon by the prosecution is that the deceased was found boarding an autorickshaw by PW2. PW2 has given evidence that he saw deceased Mohammed on 30.8.1999 at 8.10 p.m. (it is relevant to note that he has stated the exact time). According to him he was going towards the jewellery shop and had a tea from a hotel and was proceeding to the fish market while the deceased Mohammed was found in front of the same hotel and boarding into an autorickhsaw and went towards Pandikkad. The evidence of PW2 even if believed as a whole will only prove that deceased Mohammed was boarded into an atutorickshaw at 8.10 p.m. on the date on which the murder was committed. Learned counsel for the appellant argued that PW2 has not identified the accused and he has not seen the accused driving the autorickshaw. Nothing has been brought out from his evidence to disbelieve the fact that he had seen deceased Mohammed boarding into an autorickshaw. But it is relevant to note that PW2 has not even stated the number of the autorickshaw or even any identifying mark which would connect the accused with the autorickshaw. He has not even stated whether the autorickhsaw has any particular name or there was any identifying features which would connect the autorickshaw in which the deceased has travelled with the accused. It is proved by the evidence of PW2 that deceased Mohammed got into an autorickshaw driven

by somebody which belongs to somebody. But this circumstance alone is not sufficient to hold that deceased Mohammed got into the autorickshaw driven by accused on the crucial day. But the learned Sessions Judge entered a finding in paragraph 27 that the evidence adduced by the prosecution indicate that the deceased had boarded the autorickshaw of the accused. This finding is not supported by evidence adduced in this case.

BLOOD ON THE AUTORICKSHAW:

In the light of the finding already entered into, the presence of blood on the autorickshaw MO9 will not connect the accused with the crime. As longs MO9 is not proved to be that of the accused or that to be driven by the accused on the crucial night even if blood is found on the autorickshaw it cannot be treated as an incriminating evidence against the accused. Even otherwise the evidence adduced by the prosecution to prove that there was blood on autorickshaw is not quite convincing. The Circle Inspector has not examined before the lower court since he had expired much prior to Ext.P2 seizure mahazar by which the autorickshaw MO9 was taken into custody. As per the description in Ext.P2 there was bloodstains on the back portion of the autorickshaw (not on the autorickshaw). But it has come out from the evidence of PW25 that the said blood stains were seized using a cotton piece. But the said cotton piece has not been sent for

analysis. PW25 gave evidence that he has supervised the investigation and that, as per Ext.P2, it has been recorded that there was blood stains and it was taken using a sterilized cotton and entrusted by PW23 to the Investigating Officer. Though the competency of the officer who gave evidence on this aspect is doubtful and the admissibility of his evidence is also doubtful, even if the entire evidence is accepted, there is no Chemical Analyst's report produced in respect of the cotton by which bloodstains were taken. It has been admitted by PW5 that the said cotton was not sent for examination. Therefore, there is no convincing evidence that there was bloodstains in MO9.

In this context, the evidence of PW23 also gains significance. PW23 is the Scientific Assistant and she has deposed that there was no visible bloodstains on the autorickshaw. There is no reason to reject the evidence given by PW23 on this case. This evidence goes totally contradictory to the contents Ext.P2 as per which there was visible bloodstains on the autorickhsaw. That apart, PW23 has deposed that on the back seat of the autorickshaw there was some slight positive sign of blood and she has collected the same and it was entrusted with the investigating officer with instruction to get it analysed. He had also given a report Ext.P20. But the said article was not sent for chemical analysis. The said cotton piece was

also not produced. There is absolutely no positive evidence of bloodstain and that cotton piece was sent for analysis which could be an incriminating evidence. There is no explanation for not sending the article for chemical analysis. In the above circumstances the prosecution has failed to prove that there was blood on the autorickshaw MO9.

But the court below found that the Scientific Assistant detected small tracess of washed stain of blood from the lower side of the back seat of M.O.9 auto rickshaw and has taken into consideration this circumstance also to convict the accused. In the absence of any evidence to show that there was blood on M.O.9, the court below has committed an error in taking into consideration the said circumstances which was said to be proved by the prosecution against the accused.

Tear on the auto rickshaw:

According to the prosecution, there was a tear on the auto rickshaw M.O.9 and it was noted in Ext.P2 mahazar under which the auto rickshaw was taken into custody by the Investigating Officer. That tear was caused to be examined by the Forensic Expert and PW.19 the Joint Director, working in the said Forensic Laboratory was examined to prove the same. he has given evidence that he was working as the Assistant Director on 5.10.1999 and he examined M.O.9 auto rickshaw which was kept in the premises of

Manjeri Police Station. According to him, a tear of 5 cm. length was found on the inner right side portion of the passenger cabin at a height of about

In the result, the conviction and sentence passed against the appellant under Sections 302, 392 and 201 of the Indian Penal Code are set aside and he is acquitted of the said offences. He is set at liberty forthwith. He shall be released from prison forthwith in case his detention is not found necessary in connection with any other case. The Registry shall issue release order to the concerned Superintendent of Jail, where the appellant isunder detention.

The appeal is allowed as above.

P.R. RAMAN,
(JUDGE)

K. HEMA,
(JUDGE)

knc/-